(30,435)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 470

MIDLAND LAND AND IMPROVEMENT COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 30, 1924

[fol. 1] **IN THE COURT OF CLAIMS**

No. 33713

MIDLAND LAND AND IMPROVEMENT COMPANY, a Corporation,

vs.

THE UNITED STATES

I. PETITION—Filed Feb. 6, 1917

To the Honorable the Chief Justice and the Judges of the Court of Claims:

Your petitioner, the Midland Land and Improvement Company, respectfully represents and shows as follows:

It is now, and at all times hereinafter mentioned and referred to, was, a corporation, organized under the laws of the State of New Jersey, with its principal office for the transaction of business located at the City of New York, in the State of New York; it is the sole owner of the claim herein set forth, no part thereof having been assigned to any other person or corporation; and this suit is brought in its own behalf.

On June 29, 1907, an advertisement was issued and published by Colonel D. W. Lockwood, Corps of Engineers, for and in behalf of the United States of America, under the provisions of the River and Harbor Act, approved March 2, 1907 (34 Stat., 1073, 1079), soliciting and inviting proposals until July 30, 1907, for certain dredging in Newark Bay and Passaic River, New Jersey, under the direction of the Army Engineers.

[fol. 2] At the same time printed reports, surveys, maps, estimates, drawings and specifications for the proposed work were issued by the Secretary of War for distribution among, and for the information, guidance and direction of, bidders, and were by his order made the basis on which bidders should make their estimates and submit their proposals for executing the said work.

Thereafter, claimant made careful examination of the said reports, surveys, maps, drawings and specifications, and, as far as possible, examined the conditions obtaining along the line of the proposed work, satisfied itself as to the kind and quality of the materials to be excavated, the method to be adopted, and the plant required therefor, and, generally, familiarized itself with all conditions relating thereto, so far as the same could be anticipated, ascertained, learned and understood from such information so obtained; and, relying upon the said printed reports, surveys, maps, estimates, drawings and specifications and information so obtained, did on the 30th day of July, 1907, file a sealed proposal for doing the dredging contemplated and specified therein, at the rate of sixteen and one-quarter cents (16¼c.) per cubic yard, scow measurement, in accordance with paragraph 28 of the specifications referred to, which proposal was by the defendants thereafter duly accepted in writing.

On August 12, 1907, pursuant to the acceptance of said proposal by the Government, a contract in writing was entered into by and between the claimant and defendants, whereby the claimant undertook and agreed, under penalty of bond as required by the contract, to furnish the necessary labor and plant and to dredge, excavate, remove and dispose of the materials contemplated, specified and de- [fol. 3] scribed in the said advertisement, proposal, specifications, reports, drawings, surveys, maps and estimates; and the defendants therein agreed to pay for all such material so specified, when satisfactorily dredged, removed and disposed of under the said contract, at the rate of sixteen and one-quarter cents (16¼c.) per cubic yard, scow measurement.

By the terms of the contract it is provided:

"The required rate of work will be at least 50,000 cubic yards per month."

A copy of the said contract, with the attached advertisement, proposal and specifications, is herewith filed and marked "Exhibit A"; and claimant prays that the same may form and be treated as a part of this petition.

On or before August 28, 1907, the claimant was duly notified, in writing, by Chief of Engineers of the United States Army of the approval by him of the said contract, and on the last-named date the claimant began work thereunder, and, thereafter, prosecuted the said work with faithfulness and energy, in strict accordance with the requirements of the said contract and specifications, and from August 28, 1907, up to August 3, 1911, dredged, excavated, removed and disposed of the material involved at a rate largely in excess of 50,000 cubic yards a month, as directed by, and to the entire satisfaction of, the Government Engineer in charge of the work.

On August 3, 1911, a new or supplemental agreement, made pursuant to the Act of Congress, approved February 27, 1911 (38 Stat., 933, 936), setting forth in express terms that it was found advantageous and in the best interests of the United States to modify the aforesaid agreement of August 28, 1907, was made and entered into [fol. 4] by and between the claimant and the defendants, whereby the claimant undertook to do the additional dredging required to widen the channel in the Passaic River on the south side of the line of work then being done under the contract of August 28, 1907, in the vicinity of Listers Chemical Works, and at other bends in the river, below the Montclair and Greenwood Lake Railroad bridge, the additional dredging likewise to be paid for at the rate of sixteen and one-quarter cents (16¼c.) per cubic yard, scow measurement.

A copy of the said contract is herewith filed and marked "Exhibit B"; and the claimant prays that the same may form and be treated as a part of this petition.

Between August 28, 1907, and October 1, 1912, the claimant operating, first, under the contract of August 28, 1907, and, later, under it and the contract of August 3, 1911, dredged, excavated, and

removed from the lines of said work and disposed of, in accordance with the specifications, and as prescribed by the Government Engineer in charge, a large quantity of material, to-wit, 3,153,633 cubic yards which was all the material of the kind specified in the said contract that the claimant was permitted by the Engineer in charge for the government to remove from the line of the said work, all of which work was performed at a rate in excess of 50,000 cubic yards a month and was duly accepted by the Engineer in charge for the government.

For the work so done in removing the said amount of material, the claimant became entitled under the said contracts at the rate of sixteen and one-quarter cents (16¼c.) per cubic yard to the sum of Five hundred and twelve thousand four hundred and sixty-five dollars and twenty cents ($512,465.20), of which there has been [fol. 5] paid by the defendants unto the claimant the sum of Four hundred and seventy-eight thousand four hundred and sixty-seven dollars and five cents ($478,467.05), leaving a balance due amounting to Thirty-three thousand nine hundred and ninety-eight dollars and fifteen cents ($33,998.15), for which claimant asks judgment.

C. C. Calhoun, Attorney for Claimant. Dan'l B. Henderson, of Counsel.

Jurat showing the foregoing was duly sworn to by Charles F. Wood omitted in printing.

[fol. 6] "Exhibit A" to Petition

Form 19A

1. This agreement entered into this 12th day of August, nineteen hundred and seven, between Colonel D. W. Lockwood, Corps of Engineers, United States Army, of the first part, and Midland Land & Improvement Company, of New York, in the County of New York, State of New York, of the second part, witnesseth that in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Colonel D. W. Lockwood, Corps of Engineers, for and in behalf of the United States of America, and the said Midland Land & Improvement Company, do covenant and agree to and with each other, as follows:

That the said party of the second part shall furnish the necessary labor and plant, and dredge about four million one hundred and seventy-seven thousand one hundred and ten (4,177,110) cubic yards of material, scow measurement, in Newark Bay and Passaic River, N. J.; and that the said party of the second part shall be paid therefor at the rate of sixteen and one-quarter (16¼) cents per cubic yard, scow measurement, amounting to about $678,780.38, for all material which shall have been satisfactorily removed and disposed of.

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

[fol. 7] 3. The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraphs 14 and 21 of the attached specifications.

4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money and reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid to the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the [fol. 8] first part may deduct all the above-mentioned sums out of or from the money or reserved percentage as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with law.

5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time limit originally set for completion shall be determined by the said party

of the first part and deducted from any payments due or to become due the party of the second part:

Provided, however, that the party of the first part may with the prior sanction of the Chief of Engineers, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforseeable cause or delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work [fol. 9] or delivering the materials within the period required by the contract, but such waiver of the time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract.

6. If, at any time during the completion of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both labor and material thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having first been agreed upon by the contracting parties and approved by the Chief of Engineers.

[fol. 10] 8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand,

or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the said party of the second part as prescribed in paragraphs 16 and 28 of the specifications hereto attached and forming part of this agreement.

12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer or the transferee, but all rights of action for any breach of this contract by said Midland Land & Improvement Company are reserved to the United States.

13. No Member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, [fol. 11] is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

But this stipulation, so far as it relates to Members of, or Delegates to, Congress, is not to be construed to extend to this contract.

14. This contract shall be subject to the approval of the Chief of Engineers, U. S. A.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witness: H. Pedlar, as to W. D. Lockwood, Colonel, Corps of Engineers. (Seal.) Witness: Chas. T. Ellis, Secy., as to Midland Land & Improvement Co., by Wilbur G. Fisk, Pres.

(Executed in triplicate.)

Approved August 27, 1907. A. Mackenzie, Brig. Gen., Chief of Engineers, U. S. Army.

[fol. 12] Improvement Channel in Newark Bay and Passaic River, N. J.

Advertisement

U. S. Engineer Office,

Room C 8, Army Building, 39 Whitehall Street

New York City, June 29, 1907.

Sealed proposals for dredging in Newark Bay and Passaic River, N. J., will be received at this office until 12 M., July 30, 1907, and then publicly opened. Information furnished on application.

D. W. Lockwood, Colonel, Corps of Engineers.

General Specifications

1. No proposal will be considered unless accompanied by a guaranty, which should be in manner and form as directed. At the option of bidders certified checks for the amount of the guaranty required may be furnished in place of the guaranty.

2. All bids and guaranties must be made in duplicate upon printed forms to be obtained at this office.

3. Each guarantor will justify in the sum of Eighty thousand dollars ($80,000). The liability of the guarantors and bidder is determined by the Act of March 3, 1883, 22 Statutes, 487, Chap. 120, and is expressed in the guaranty attached to the bid.

[fol. 13] 4. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of One hundred thousand dollars ($100,000) within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

5. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for dredging in Newark Bay and Passaic River, N. J.," to be opened July 30, 1907, and inclosed in another sealed envelope addressed to Colonel D. W. Lockwood, Corps of Engineers, Army Building, New York, but otherwise unmarked. It is suggested that the inner envelope be sealed with sealing wax.

6. Whenever the term "Engineer" is used in the specifications it is understood to refer to the officer of the Corps of Engineers, U. S. Army, in charge of the work. He will be represented on the work by as many assistants as may be necessary. Whenever the term "contractor" is used it is understood to refer to the second party to the contract. Subcontractors, as such, will not be recognized.

7. It is understood and agreed that the quantities given in these specifications are approximate only, and that no claim shall be made [fol. 14] against the United States on account of any excess or deficiency, absolute or relative, in the same. No allowance will be made for the failure of a bidder or of the contractor to estimate correctly the difficulties attending the execution of the work.

8. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

9. It is understood and agreed that the contractor assumes full responsibility for the safety of his employees, plant, and materials,

and for any damage or injury done by or to them from any source or cause.

10. In the prosecution of the work herein specified, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction is prohibited.

11. The contractor will be required to discharge any employee who, in the opinion of the Engineer, is objectionable or incompetent. Such discharge shall not be made the basis of any claim for compensation or damages against the United States or any of its officers or agents.

12. The contractor must at all times either be personally present upon the work or be represented thereon by a responsible agent, who shall be clothed with full authority to act for him in all cases and to carry out any instructions relative to the work which may be given by the Engineer, either personally or through an authorized representative.

13. No work shall be done on Sundays or legal national holidays except in cases of emergency, and then only with the consent of the [fol. 15] Engineer; nor shall any work be done at night unless authorized in writing by the Engineer.

14. The contractor will be required to commence work under the contract within Thirty (30) days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, unless otherwise authorized by the Engineer, to prosecute the said work with faithfulness and energy, in accordance with paragraph 21.

15. The time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital, and experience, unless extraordinary and unforeseeable conditions supervene.

16. Payments for accepted work will be made monthly for material excavated and deposited, and not previously paid for, subject to the condition that no payment, except the final one, will be made for the excavation and deposit of a quantity less than 50,000 cubic yards, scow measurement, unless in the opinion of the Engineer the work has been unavoidably delayed by bad weather, or unless a less quantity has been required by the Engineer in charge to be removed during the calendar month next preceding the month of payment. A percentage of ten (10) per centum will be reserved from each payment until half the work under the contract, as estimated by the Engineer, has been completed, after which there shall be no further reservation. The reserved percentage will be paid upon the satisfactory completion and final acceptance of work under the contract:

Provided, That should payments be discontinued for a period of [fol. 16] one year, owing to lack of funds, the total amount retained from previous payments shall be paid the contractor.

17. The price bid shall be full compensation for furnishing all necessary labor, materials and appliances of every description, and for doing all the work herein specified to the satisfaction of the Engineer, and shall include all risks and delays of whatever nature attending the execution of the work.

Special Conditions

18. The River and Harbor Act, approved March 2, 1907, contains the following provisions:

Improving channel in Newark Bay and Passaic River, New Jersey, in accordance with the report submitted in House Document Numbered Four hundred and forty-one, Fifty-ninth Congress, second session, Two hundred thousand dollars: Provided, That the Secretary of War may enter into a contract or contracts for such materials and work as may be necessary for the prosecution of said work, to an amount not exceeding in the aggregate Six hundred and fifty thousand dollars, to be appropriated for, from time to time, according to law, in addition to the amounts herein and heretofore appropriated.

It is expected that Congress will, in accordance with the provision of the act quoted in the preceding paragraph, make appropriations at such times as to permit work to be done in each period of twelve months during the continuance of the contract. But the contractor must take his own risk in this, and it is distinctly understood and agreed that the United States is in no case to be made liable for [fol. 17] damages in connection with this contract on account of delay in payments on same due to a lack of available funds.

The amount now available for payments for dredging under the contract, including cost of administration and superintendence, is about Two hundred thousand dollars ($200,000).

Should available funds become exhausted during the progress of the work, the contractor will be duly notified, and he is given the option of continuing the work as rapidly as possible under the law and contract, relying upon future appropriations for payment, or of suspending op-rations until such appropriations are actually made and available. But the contractor must promptly notify the Engineer which method he will adopt, so that sufficient funds may be reserved from appropriations on hand to cover contingencies and superintendence, should he elect to continue the work in advance of appropriations. In case work is suspended while awaiting appropriations by Congress, the contractor shall resume work within thirty (30) days after notification that funds are again available for payments for work under the contract.

I. Description of Work

19. (a) The work to be done under these specifications consists in dredging a channel as above authorized 16 feet in depth at mean low water through Newark Bay and Passaic River from Staten Island Sound to the Montclair and Greenwood Lake Railroad bridge, a distance of 10.8 miles. The width of this channel to be 300 feet to the Nairn Linoleum Works, a distance of 9.7 miles; thence 200 feet in width 1.1 miles, to the Montclair and Greenwood Lake Railroad Bridge.

[fol. 18] (b) Depth, Side Slopes, and Tides:—Under the pro-ect of June 13, 1902, a channel is in progress 200 feet wide throughout the reach to be improved. This channel is to be 12 feet deep to the Nairn Linoleum Works and 10 feet deep above that point, and of the 10.8 miles to be dredged, about 8 miles from Newark Bay up have been completed; and the entire channel will be completed under certain contracts now in force and in progress. There are no natural depths in the river in excess of those to be dredged under the project of 1902. The minimum depths in the river on either side of this channel are from 6 to 8 feet up to the vicinity of the Nairn L-noleum Works and about 4 feet above that locality.

The depth required is sixteen (16) feet at mean low water; an allowance of one (1) foot for overdepth in dredging will be made.

Natural side slopes due to falling in of the banks of excavation during dredging, up to and not exceeding slopes of 1 or 2, will be allowed. In estimating for deductions for dredging beyond limits and for overdepths the ratio between scow and prism measurement will be the same as stated in paragraph 28. The mean range of tides is about 4¾ feet.

(c) Character of material.—The material to be excavated is believed to be mud, sand and gravel, but bidders are expected to examine the work and decide for themselves as to its character and make their bids accordingly, as the United States will not guarantee the accuracy of this description. The price bid per cubic yard will cover the removal of all material encountered, except ledge rock.

[fol. 19] (d) Amount of Dredging.—The quantity of material to be removed under the contract will depend upon the price bid.

II. Conduct of the Work

20. Order of Work.—The location and order of work will be determined by the Engineer, and the dredging shall be done as prescribed by him. The general order of the work will be to divide it into sections 150 feet in width, beginning at the lower end in Newark Bay, and proceeding as may be directed. After it is reported as finished, a careful examination of the bottom will be made under the direction of the Engineer, and before final acceptance the contractor shall remove any lumps or ridges that have been left during the work. It — is found that any material has been dredged from any point below or outside the limits given for work, unless authorized

by the Engineer, the amount of such material shall be deducted from the total amount dredged before final acceptance of the work.

21. Rate of Work and Time for Completion.—Work must be commenced and prosecuted as provided in paragraph 14. No work will be required in the months of December, January and February, but it may be continued in these months if the contractor so desires. The required rate of work will be at least 50,000 cubic yards per month, unless otherwise authorized by the Engineer. If at any time after the date fixed for beginning the work it shall be found that operations are not being carried on as rapidly as required by the contract, the Engineer shall have power, after due notice in writing to the contractor, to employ such additional plant or labor, or to [fol. 20] purchase such material as may be necessary to insure the proper completion of the work within the time specified, and the excess cost thereof over what the work would have cost at the contract rate shall be a charge against any sums due or to become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract.

22. Disposal of Material.—The contractor will provide his own dumping ground, subject to the approval of the Engineer, and expenses incurred to this end will be paid by the contractor, without reimbursement by the Government. The material excavated must be disposed of in accordance with law; any material deposited elsewhere than in designated or approved places will not be paid for, and the contractor may be required to redredge such material and deposit where directed. All scows must be kept in good condition, the coamings kept repaired, and the pockets provided with proper doors or appliances, so that no leakage of material may occur during transit from the dredges to the dumping grounds.

23. Liability of Contractor.—The contractor will be held responsible that his employees strictly observe the laws of the United States, especially as to the throwing or dumping any material into the navigable waters of the United States other than as designated, or obstructing navigation other than as authorized. He will be expected to comply with the laws of the United States and the States as to the inspection of boilers, hulls, etc., and the licensing of masters, engineers, etc. He shall conform to such sanitary requirements as may be prescribed by the Engineer.

[fol. 21] 24. Navigation and Responsibility for Damages.—The contractor will be responsible for keeping lights, in accordance with law, on all of his plant, and shall maintain and operate it in the channel in such a way as to interfere as little as possible with navigation, but under no circumstances shall the United States be held responsible for any accident or in-ury to the contractor's employees, plant, or materials, passing vessels, or to any person or property whatever, nor for any damage done by or to them, or any of them, from any source or cause during the progress of the work, and by reason of it. When required by the Engineer, the contractor shall remove his plant to one side of the channel at night, also buoys, piles, and other articles placed in the waterway, and shall leave the

channel in good order, clear and fit for navigation. The United States shall not be responsible for delays to the contractor incidental to the operation or passage through bridges, or for the removal or relaying of cables or pipe lines crossing the river.

III. Plant

25. The excavation and disposal of material may be done by any method and with any kind of plant capable of doing the work satisfactorily, but it must be such as, in the opinion of the Engineer, is sufficient. In the case of the accepted bidder, the statement of plant will constitute a part of the contract, and any disadvantageous alteration in the working plant, made without the knowledge and consent of the Engineer will be considered a violation thereof. (See paragraph 29.)

[fol. 22]

IV. Supervision

26. Operations will be carried on under the immediate supervision of Inspectors to be appointed by the Engineer, and their orders and instructions shall be obeyed by the contractor and his employees. The Assistant Engineer or Inspector will establish ranges, tide gauges, and the datum to which the channel depths are referred. Any differences arising between the Inspector and contractor will be referred to the Engineer, except as otherwise specifically provided in paragraph 28, whose decision in the matter will be final. The contractor must furnish suitable range stakes for marking the cuts, and painted tide gauges, and must place and maintain them under the Inspector's supervision. He must furnish the Inspectors with suitable boats, sounding poles, and all necessary assistance for setting range stakes and taking soundings, and transport the Inspectors from the dredge to the shore and back whenever required to do so, in safe and suitable boats, furnishing a tug or power boat in localities especially exposed to danger from strong tides or passing vessels. He must also furnish the Inspectors, if required by the Engineer, with suitable room on the plant for office purposes, and meals served on board the plant during working hours. The cost of these several requirements must be included in the price for work under these specifications.

27. Sweeping, Sounding, and Removal of Shoals and Obstructions.—At such times as may be directed by the Engineer, a careful sweeping or sounding of the bottom dredged over shall be made. The contractor, if required, will furnish for such sweeping an adjustable, horizontal sweep rod, satisfactory to the Engineer, and [fol. 23] maintain and operate it under the direction of the Assistant Engineer or Inspector, the cost of such sweeping or sounding to be included in the price bid. The contractor shall remove any lumps, or ridges, except rock, that may have been left during the work.

V. Measurement and Payment

28. (a) The material removed will be measured by the cubic yard, either in scows, if placed in such, or in the cut prism, five (5) cubic yards of prism measurement to be considered equivalent to six (6) cubic yards measured in scows. In case of scow measurement the Assistant Engineer and Inspector or Suveyor will measure each scow before it is employed upon the work, and whenever they think it desirable during the progress of the work and determine its capacity. In order to facilitate the accurate estimation of the material excavated, the contractor will furnish every facility for the measurement of the dimensions of the scows to be used, and no claim will be made for any delay incident to these measurements. The Inspector's judgment as to whether any scow is full or to what extent it is short shall be accepted as final. Unless otherwise authorized by the Engineer, each pocket must be loaded to a practically level plane, either to the top or bottom of the coamings or other intermediate or lower plane approved by the Engineer, and no payment will be made for pockets loaded otherwise. Before beginning work, the contractor will see that the number of each scow and its capacity in cubic yards, as determined by the Assistant Engineer or Inspector, are conspicuously painted upon it; these figures shall be changed whenever required by the Engineer. In case of prism measurement, [fol. 24] the Assistant Engineer or Inspector will take accurate soundings before the commencement and after the completion of the work, and from these will determine the amounts removed. At localities where scour would make this method impracticable, the quantity removed by the contractor will be determined in such manner as the Engineer may direct. Approximate estimates for intermediate payments will be made from time to time, as accurate as may be.

(b) Payments will be made as provided in paragraph 16, and they will be based upon the Assistant Engineer's or Inspector's estimates of the amount of material removed and deposited, after making any deductions provided for under paragraphs 20, 21 and 22. No payment will be made for any work under the contract unless it is done in exact accordance with these specifications, and with the orders and instructions concerning it, which may be given by the Engineer, or by the local Engineer or Inspector who is authorized to act for him.

VI. Proposals

29. Stipulations.—Bidders will state in the proposal a price per cubic yard, scow measurement, for dredging and removal of material. Bidders shall also state the kind, capacity, number, condition, and location of dredges, scows, tugs, and other appliances it is proposed to use, and provide facilities for inspecting same. (See paragraph 25). All expenses of every description which the contractor may find it necessary to incur in the protection of the work, as required by these specifications, and by the orders and instructions which

may be given concerning it, should be provided for in the price bid, as no extra allowance or payments of any kind will be made except [fol. 25] as provided for in the form of contract to be entered into.

30. Explanations and Corrections.—Any doubt as to the meaning of these specifications, and any obscurity in the wording of them, will be explained by the Engineer, who shall have the right to correct any errors or omissions in them when such correction is necessary for the proper fulfillment of their intention.

[fol. 26] Proposal for Dredging in Newark Bay and Passaic River, N. J.

62 Cedar Street,
New York City, July 30th, 1907.

To Colonel D. W. Lockwood, Corps of Engineers, U. S. Army, Army Building, New York, N. Y.

SIR: In accordance with your advertisement of June 29, 1907, inviting Proposals for dredging in Newark Bay and Passaic River, N. J., and subject to all the conditions and requirements thereof, and of your specifications dated June 29, 1907, copies of both of which are hereto attached, and, so far as they relate to this proposal, are made a part of it, we (or) I propose to do the required dredging at the rate of sixteen and quarter cents (16¼ cts.) per cubic yard, based on scow measurement, in accordance with paragraph 28 of these specifications.

Bidders will here state the information called for in paragraph 29.

It is proposed to use in the above-named work seven (7) dredges and twenty (20) scows, more particularly described as follows:

Dredges

Name	Kind	Capacity	Condition
No. 1	Combination D. & C	4,000 yards	Good.
No. 2	Hydraulic	5,000 yards	Being Rebuilt.
No. 3	Hydraulic	3,000 yards	Good.
No. 4	Hydraulic	6,000 yards	Good.
No. 5	Dipper	1,000 yards	Good.
Columbia	Dipper	2,000 yards	Good.
Yale	Dipper	800 yards	Good.

[fol. 27]

Scows

Name or number	Kind	Capacity	Condition
41, 43, 45, 49, 51	Valve Bumpers	1,600 cu. yds. each	Good.
10, 12, 16	Deck	500 cu. yds. each	Good.
25, 30	Dump	300 cu. yds. each	Good.
19, 47, 57, 59	Dump	1,600 cu. yds. each	Good.
7, 8, 9	Dump	100 cu. yds. each	Good.
10	Dump	480 cu. yds. each	Good.
16, 12	Dump	626 cu. yds. each	Good.

The bidder will state here whether he is now or ever has been engaged on any contract or other work similar to that proposed; if

he is now, he will give the nature and location of the work; if he has been, he will give, in addition to the location and nature of the work, the year in which it was done, the manner of its completion, and such other information concerning such work as woll show his ability to vigorously prosecute the work required by the accompanying specifications.

The Manager of this Plant has been engaged in this Class of Work for many years, i. e., Hudson River, U. S. Contract, 1900 to 1906, Completed O. K.

Newark Bay & Passaic River, 1904 to 1906, Completed O. K. New Haven, Conn., U. S. Contract, Completed O. K. Great South Bay, 1904, Completed O. K. Patchogue River, 1906, Completed O. K. Staten Island Sound, 1904, Completed O. K., and at least 50 other contracts.

We (or) I make this proposal with a full knowlege of the kind, quantity, and quality of the work required, and, if it is accepted, will, after receiving written notice of such acceptance, enter into contract within the time designated in the specifications, with good and sufficient sureties for the faithful performance thereof.

(Signature) Midland Land & Improvement Co., by William C. Fisk, Pres., (Address) 62 Cedar St., New York City.

(Signed in duplicate.)

[fol. 28] "EXHIBIT B" TO PETITION

Form 19B

Whereas, on the 12th day of August, 1907, a contract was entered into between Colonel D. W. Lockwood, Corps of Engineers, United States Army, representing the United States of America, of the first part, and Midland Land & Improvement Company, of New York, in the County of New York, State of New York, hereinafter designated as the contractor, of the second part, for dredging in Newark Bay and Passaic River, New Jersey.

And whereas, it is found advantageous and in the best interest of the United States to modify the said contract as hereinafter specified, for the following reasons:

That since the said contract was entered into requests have been made upon the United States by interested parties for the removal of a shoal in the Passaic River on the south side of the present lines of the work now being done under said contract and in the vicinity of Listers Chemical Works, between the Pennsylvania Railroad freight bridge and the Jackson Street highway bridge; and

Whereas, in the river and harbor act approved February 27, 1911, it is provided, that the project for the improvement of the Passaic River below the Montclair and Greenwood Lake Railroad bridge may, in the discretion of the Secretary of War, be so modified as to allow the widening of the channel of the river at bends wherever considered desirable in the interest of commerce and navigation, and provided also, that no additional work shall be done under this

[fol. 29] authority which will increase the total cost of the project given in report submitted in House Document Numbered Four hundred and forty-one, Fifty-ninth Congress, second session, under which project the work embraced in the present contract dated August 12, 1907, is being prosecuted; and

Whereas, The Midland Land & Improvement Company, the contractor above referred to, has offered to do the additional amount of dredging required to widen the channel of the Passaic River in the vicinity of Listers Chemical Works, and at any other bends in the river where considered desirable in the interest of commerce and navigation, at the same rate provided for in said contract of August 12, 1907, namely, sixteen and one-quarter cents (16¼c.) per cubic yard, scow measurement;

Now, therefore, The said contract is, on this 3rd day of August, 1911, hereby modified in the following particulars, but in no others:

That the said contractor, the Midland Land & Improvement Company, shall do the additional dredging required to widen the channel in the Passaic River on the south side of the present lines of the work now being done under said contract in the vicinity of Listers Chemical Works, between the Pennsylvania Railroad freight bridge and the Jackson Street highway bridge, and at any other bends in the river below the Montclair and Greenwood Railroad bridge where considered desirable in the interest of commerce and navigation, and where required by the contracting officer, and to lines to be indicated by the contracting officer in each case; Provided, That the total quantity of material to be removed under the contract dated August 12, 1907, above referred to, and the supplemental [fol. 30] agreement shall not exceed the quantity stated in said contract (4,177,110 cubic yards) by more than 10 per cent.

That the said contractor shall be paid therefor at the rate of sixteen and one-quarter cents (16¼c.) per cubic yard, scow measurement, for all material that shall have been satisfactorily removed and disposed of.

This supplemental agreement shall be subject to the approval of the Chief of Engineers, U. S. Army, and the Secretary of War.

In witness whereof the parties aforesaid have hereunto placed their signatures the date first hereinbefore written.

Witness: H. Pedlar, as to Wm. T. Rossell, Colonel, Corps of Engineers. Witness: F. W. Watz, Asst. Secy., as to Midland Land & Improvement Co., by Wilbur C. Fisk, Pres.

(Executed in triplicate.)

Approved August 10, 1911. W. H. Bixby, Chief of Engineers, U. S. Army.

Approved August 14, 1911. John C. Scofield, Assistant and Chief Clerk for the Secretary of War in his absence.

[fol. 31] II. AMENDED PETITION—Filed February 27, 1923

To the Honorable the Chief Justice and the Judges of the Court of Claims of the United States:

The claimant, the Midland and Improvement Company, with the consent of the Court first had and obtained, now comes and files this its amended petition herein.

In addition to the work done as set forth in claimant's petition herein, claimant respectfully shows that the payments for the work done in Section 4, under the contracts set forth in claimant's petition, were not made monthly as was done elsewhere under the contracts, and no final estimate was ever made covering this work. The credits and payments made and the material actually dredged to the date of the annulment of the contract, on Section 4, were as follows:

[fol. 32]	Credited (cubic yards)	Actually dredged (cubic yards)
To November 1, 1910	42,000	133,477
November, 1910	46,000	31,467
December, 1910	64,000	17,450
To October 13, 1911	48,000	173,523
To November 11, 1911	90,000	23,580
December, 1911	954*	954
January, 1912	1,328*	1,328
	292,282	381,779
Balance never credited or paid	89,497	

(Ten Day Reports: Papers from the General Accounting Office, filed May 4, 1922.)

Therefore, there is due claimant for dredging said 89,497 cubic yards of material at the contract price of 16¼c per cubic yard, the additional sum of $14,543.26, for which plaintiff asks judgment.

Jurat showing the foregoing was duly sworn to by C. C. Calhoun omitted in printing.

C. C. Calhoun, Attorney for Plaintiff.

[fol. 33] III. GENERAL TRAVERSE

No demurrer, plea, answer, counterclaim, set-off, claim of damages, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

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*Credited to another section by Defendant's engineers.

IV. Argument and Submission of Case.

On February 14, 1923, the case was argued on merits by Mr. C. C. Calhoun, for the plaintiff, and by Mr. Alexander H. McCormick, for the defendant. Plaintiff given leave to amend petition and case passed to Monday, February 19, 1923.

On February 19, 1923, the argument was concluded by defendant and the case submitted. Plaintiff given leave to file an amended petition.

On February 27, 1923, the plaintiff filed an amended petition. (Said amended petition can be found on page 31 of this record.)

[fol. 34] V. **Findings of Fact, Conclusion of Law, and Opinion of the Court by Booth, J.**—Entered April 2, 1923

This case having been heard by the Court of Claims, the court upon the evidence makes the following

Findings of Fact

I

The plaintiff is, and was during the transactions hereinafter set out in these findings of fact, a corporation duly incorporated under the laws of the State of New Jersey with its principal office for the transaction of business in the city of New York.

II

The plaintiff on August 12, 1907, entered into a contract with the United States to dredge and dispose of approximately 4,177,110 cubic yards of material, scow measurement, in Newark Bay and Passaic River for 16¼ cents per cubic yard. The work to be performed under the contract was to dredge a channel 16 feet deep at mean low water from Staten Island Sound through Newark Bay and the Passaic River to the Montclair and Greenwood Lake Railroad bridge, a distance of 10.8 miles, 300 feet wide to the Nairn Linoleum Works, a distance of 9.7 miles, and thence 200 feet wide to the Montclair and Greenwood Lake Railroad, 1.1 miles, and the work was required to begin within 30 days after receipt by the contractor of notice of the approval of the contract (par. 14 of the specif.) and to be prosecuted "with faithfulness and energy."

The specifications, among other things, provided (par. 16) that "A percentage of ten (10) per centum will be reserved from each payment until half of the work under the contract, as estimated by the engineer, has been completed, after which there shall be no further reservation."

The specifications also contained a statement (par. 19) that "The material to be excavated is believed to be mud, sand, and gravel, but bidders are expected to examine the work and decide for themselves as to its character and make their bids accordingly, as the United States will not guarantee the accuracy of this description.

The price per cubic yard will cover the removal of all material encountered, except ledge rock."

[fol. 35] The specifications (par. 21) stipulated that "The required rate of work will be at least 50,000 cubic yards per month, unless otherwise authorized by the engineer. If at any time after the date fixed for beginning the work it shall be found that operations are not being carried on as rapidly as required by the contract, the engineer shall have power, after due notice in writing to the contractor, to employ such additional plant or labor, or to purchase such material as may be necessary to insure the proper completion of the work within the time specified, and the excess cost thereof shall be a charge against any sum due or to become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract." The paragraph also stipulated that "No work will be required in the months of December, January, and February, but it may be continued in these months if the contractor so desires."

On August 3, 1911, the plaintiff entered into a supplemental contract with the Government to widen the channel opposite Lister's Chemical Works, about 4,500 feet above the beginning of the channel in Newark Bay, and at any bends of the Passaic below the end of the channel at Montclair and Greenwood Railroad bridge, the amount of dredging not to exceed 10 per cent of the amount stated in the original contract (4,177,110 cubic yards), the contract to be governed by the same specifications as the first.

The contract and specifications are made a part of these findings by reference thereto.

III

The plaintiff in its proposal, dated June 30, 1907, for the work on which this claim is based said: "The manager of this plant has been engaged in this class of work for many years, i. e., Hudson River U. S. contract, 1900 to 1906, completed O. K.; Newark Bay and Passaic River, 1904 to 1906, completed O. K.; New Haven, Conn., U. S. contract, completed O. K.; Great South Bay, 1904, completed O. K.; Patchogue River, 1906, completed O. K.; Staten Island Sound, 906, completed O. K.; and at least 50 other contracts."

"We make this proposal with a full knowledge of the kind, quantity, and quality of the work required, and if it is accepted, will, after receiving written notice of such acceptance, enter into contract within the time designated in the specifications, with good and sufficient sureties for the faithful performance thereof."

The manager above referred to was John A. Seeley, who made the estimates for the plaintiff's bid, and who was very familiar with the whole stretch of Newark Bay and Passaic River covered by plaintiff's contract, his experience extending over a period of eleven years, and he had been superintendent of a contract for dredging a twelve-foot channel over the same course.

IV

Under the act of March 3, 1905, 33 Stat. 1117, surveys and borings were made by the Engineer office during the months of October, November, and December, 1906, of the channel from a point near the Red Bell Buoy in Newark Bay to the Montclair and Greenwood Lake Railroad bridge over the bay and Passaic River, a distance of 10.8 miles, in a northerly general direction, with a view to deepen- [fol. 36] ing the channel from 12 to 16 feet at mean low water and to determine the character of the material to be removed by dredging. The borings were made with a steel rod an inch and a half in diameter, and were driven into the bottom of bay and river by hand power, and the depth of the water and of each kind of material penetrated was recorded. This was the proper and customary way to make borings where the depths of the water and character of the bottom were such as was found in the channel proposed to be dredged. These borings were 143 in number and are recorded on three separate sheets of the survey. On sheet No. 1 the channel is about 2.2 miles in length and the borings were from 1 to 42, inclusive, and indicate mud, mud and sand, mud and shells, sand, and gravel. On sheet No. 2 the channel is about 3.1 miles in length, and the borings were from 43 to 74, inclusive, and indicate mud, mud and sand, sand, sand gravel and clay, gravel, and clay. On sheet No. 3 the channel is 5.5 miles in length, and the borings are from 75 to 143, inclusive, and indicate mud, mud and sand, sand, sand and gravel, gravel, sand gravel and clay, and bottom bowlders. Gravel, as the term is used in hydrographic engineering, indicates material running from grit to stones 2 inches in diameter, and bowlder, a word used interchangeably with cobblestone, indicates stones from 2½ to 8 inches in diameter, rounded by the action of water in the glacial period. These borings were made by competent men in good faith and according to their best judgment, and whenever they struck a bowlder the fact was recorded, the boring stopped at that place, and they went on to another place for another boring. The material afterwards dredged from the channel corresponded generally to the material indicated by the borings. These sheets were furnished to prospective bidders.

V

The Government engineers in making up their estimates prior to advertising for bids, estimated the cost of dredging the lower reaches of the channel at 26 cents per cubic yard and the upper reaches at 32 cents per cubic yard, the difference in estimates being due to the more difficult character of the material to be dredged and the number of bridges in the upper part of the channel through the draws of which the scows would have to pass. There were four other bids for the work under the contract, ranging from 22.2 cents to 36.4 cents per cubic yard.

VI

Some time in 1905 the New Jersey Dock and Improvement Company was organized by putting into it the Hughes Brothers and Bangs dredging plant and the Newark meadows property containing about 3,500 acres of land, and it was financed by Harvey Fisk and Sons and other New York financiers, and John A. Seely was made manager of the dredging plant. The land at that time was practically worthless and it was the purpose of the company to take contracts for dredging the near-by waters and thereby fill it in with dredged material. After Harvey Fisk and Sons got into the company it proved to be expensive as the taxes were raised on every acre as soon as it was filled in, and the result was that everybody got out [fol. 37] except Fisk & Sons who had to finance the whole concern. They had placed about $350,000 in the business besides spending $135,000 on repairs to the dredging plant. Finally Harvey Fisk and Sons foreclosed its lien on the dredging plant and Newark meadows and bought in the whole property. They then separated the land from the dredging operations and formed two companies, the Newark Meadows Improvement Company and the Midland Land and Improvement Company, and John A. Seeley became manager of the dredging company.

VII

The plaintiff began work on August 28, 1907, at the lower or southern end of the channel near the Red Bell Buoy in Newark Bay, and working in a northerly direction up Newark Bay completed dredging the channel on sheet No. 1 a distance of 2.2 miles, and thence up through the remaining stretch of Newark Bay and Passaic River, shown on sheet No. 2, completed dredging said channel, as shown on said sheet, for a distance of 3.1 miles. On sheet No. 3 plaintiff dredged the channel in the Passaic River there shown for a distance of 3.2 miles, for 2.2 miles of which half or less of the width of the channel was dredged.

When work began the plaintiff had a plant sufficiently powerful to have completed the work in the contract time, and by August, 1909, two years after the work began, it was estimated by the engineer in charge that plaintiff had completed half of the contract work, and it was paid on that basis, less ten per cent thereon ($33,998.15) held as retained percentages under paragraph 16 of the specifications. The plaintiff made good progress until the end of the year 1909, and was considerably in excess of the minimum quantity, 50,000 cubic yards, required by paragraph 21 of the specifications to be dredged per month.

There was no material encountered which plaintiff's plant, before it was allowed to run down, could not handle. It could and did pump clay and cobblestones in its hydraulic dredges, and where stone was dredged plaintiff was paid for dredging them at special prices.

After January 1, 1910, the work was carried on spasmodically and the plaintiff was in default nearly every month up to September 24,

1912. During eight months in which work was required no work was done, and in every month except three plaintiff was in default in its monthly dredging work, and in June, July, August, and September, 1912, it dredged 31,926 cubic yards instead of the minimum required by the contract, 200,000 cubic yards. In dredging the channel to 16 feet in depth, the plaintiff would frequently dredge to a greater depth, one dredge would sometimes dredge to 19 feet, and plaintiff was paid where it dredged to 17 feet; for dredging beyond that depth it was not paid. The plaintiff up to September 24, 1912, dredged 3,153,632 cubic yards under the terms of its contracts, for which it was paid $478,467.05, which, with the percentages of $33,998.15 retained as aforesaid when the work was half completed, amounted to full payment for all material dredged at the contract price of 16¼ cents pre cubic yard. The actual cost to the plaintiff for the work performed was 20¼ cents per cubic yard, a loss of 4 cents per cubic yard or a total loss of $126,145.28 on the whole work performed.

[fol. 38]

VIII

On September 24, 1912, the plaintiff stopped work on the contract. Several months prior to that date all of the stock in the dredging plant, including the retained percentage, was sold to one Frank A. Barnaby for one thousand dollars. The work continued, however, until September 24, 1912, in the name of said company under the management of John A. Seeley. The plant had been gradually running down until at the time the work stopped it was inadequate to perform the contract. Harvey Fisk & Sons, who were not dredgers, wanted to get out of the dredging business.

IX

On November 1, 1912, the plaintiff wrote to the Secretary of War requesting the cancellation of the two contracts. The summary of its letter reads:

"We respectfully submit in support of our position that the contract should be terminated—

"1. Because the difference in cost between excavating and depositing material shown by the borings, and the excavation and depositing of clay, bowlders, and other hard materials actually found, is so materially different and excessive in cost as to be inequitable and unjust, and to require the excavation and disposal of a mass of material not within the terms of the specification at the price bid for the former imposes a burden upon the contractor that is inequitable and unjust.

"2. The bid of this company was justifiably based upon erroneous information and data furnished by the Engineering Department.

"3. For reasons given the contract should be discontinued and terminated, all percentages retained should be paid to the contractor, and this contractor released from all liability thereunder.

"4. The work should be readvertised on correct information without prejudice to this contractor.

"We respectfully request that we be given an opportunity to be heard in this matter and to submit, if you should deem it advisable, evidence to support the contentions urged above.

"We further request that the United States Engineer office at the city of New York be advised of this application; that a consideration thereof is pending in your office; and that pending this consideration no further action may be taken by him prejudicial to this contractor."

To the above letter the Engineer's office in charge of the work wrote on February 8, 1913:

"SIR: Referring to progress of work upon your contract dated August 12, 1907, for dredging in Newark Bay and Passaic River, N. J., and to the decision of the department upon your application dated November 1, 1912, for cancellation of that contract, I have to say that you should resume dredging at the earliest possible date, and not later than March 1, 1913, and prosecute the work with faithfulness and energy in accordance with the contract. The entire cessation of the work is not contemplated under the contract, although you have attained the required average rate of progress to date upon same.

[fol. 39] "Please advise me of your plans and the date for resuming work, so that the necessary arrangements for inspection by this office may be made."

On February 21, 1913, the Engineer wrote to plaintiff again as follows:

"SIR: Referring to my letter of the 8th instant in reference to work upon the contract of the Midland Land and Improvement Company, dated August 12, 1907, for dredging in Newark Bay and Passaic River, N. J., please advise me when I may expect a reply."

To this letter plaintiff replied on February 28, 1913:

"COLONEL: Replying to your esteemed favors of February 8th and 21st, in reference to work upon the contract of the Midland Land and Improvement Company dated August 12, 1907, for dredging in Newark Bay and Passaic River, N. J., we respectfully refer you to our previous correspondence on this subject, wherein we have informed you of our intention to discontinue work on this contract for reasons therein specified.

"Under advice of our attorneys, we have not changed our position in the matter."

Letter from the engineer in charge to the Chief of Engineers, dated March 4, 1913, reads:

"1. Referred.

"2. In pursuance of the advice of the department as contained in paragraph 6 of the 1st indorsement, office of the Chief of Engineers,

dated Feb. 3, 1913, on my letter dated January 15, 1913 (E. D. 63777/52), in reference to progress of work on the contract of the Midland Land and Improvement Company dated August 12, 1907, for dredging in Newark Bay and Passaic River, N. J., there are inclosed herewith copies of letters from this office to the contractor dated February 8 and 21, 1913, in reference to this work. It appears from paragraph 4 of the department letter above referred to that the contractor will not be in default until July 29, 1913, if the required rate of work, 50,000 cubic yards per month, is used as the required amount of work to be accomplished up to that date.

"3. In view of the information now received from the company, advice is requested as to the propriety of annulling this contract at this time. So far as the practical consideration of this contract is concerned, the contractor abandoned work on September 24, 1912, as referred to in my report dated December 13, 1912 (E. D. 63777/40)."

To this letter the Chief Engineers replied:

"1. Since the contractor has definitely abandoned the contract, as evidenced by letter of the 28th ultimo, the contract should be at once annulled by giving notice to that effect to the contractor and the sureties, preserving evidence of the receipt of such notices. The fact and date of annulment should be reported hereon in returning this paper.

"2. After annulment of the contract recommendation as to the method of completing the work, or other course to be followed, should be submitted.

"By command of the Chief of Engineers."

Letter from engineer in charge to plaintiff dated March 14, 1913:

"SIRS: Referring to your letter of February 28, 1913, in which you have definitely informed me that you have discontinued work on your contract for dredging in Newark Bay and Passaic River, N. J., dated [fol. 40] August 12, 1907, I have to inform you that this contract, with its supplementary contract dated August 3, 1911, is hereby anulled, with the sanction of the Chief of Engineers, and that arrangements will be made to secure the performance of the uncompleted work in accordance with paragraph 4 of the contract."

No protest had been made by plaintiff as to the character of the material to be dredged up to its letter of November 1, 1912, requesting the cancellation of the contract.

X

The distance plaintiff would have been compelled to transport its material to sea, if it had not had a dumping ground on its own property, the Newark meadows, would have been from 28 to 35 miles from the beginning of the channel in Newark Bay, with an increasing distance as it progressed upwards with its work. It would have been required also to obtain a permit from the New York City gov-

ernment for every scow load dumped into the sea with a city inspector on board to see that it was dumped at the proper place. The evidence does not show how much of plaintiff's swamp land was filled in under this contract, but does indicate that a considerable part of the 3,500 acres was thus reclaimed. The filling in work had been going on before plaintiff began work on this contract and was continued through other contractors after it had abandoned its contract. The value of the land after filling in was increased $12,000 per acre over its value prior thereto, or a total increase for the 3,500 acres of $42,000,000. This land became very valuable after the World War began in 1914, when factories were started in Newark and the Government began a shipyard there, and part of the reclaimed land sold for a large sum of money.

XI

After the work was abandoned by the plaintiff and the two contracts canceled as described in Finding IX, the uncompleted part of the work was advertised August 16, 1913, on the same specifications, surveys, and borings, and was awarded to Eugene Breymann at 26⅞ cents per cubic yard, scow measurement, contract dated October 10, 1913, who completed the work. The amount of material dredged by him was 1,328,257 cubic yards. The surplus dredged by plaintiff over the minimum requirement of the contract at the time it stopped work on September 24, 1912, was exhausted by said requirement several months before work was begun under the Breymann contract.

The total cost to the Government for dredging 1,328,257 cubic yards at 26⅞ cents per cubic yard was $356,969.07. If the plaintiff had completed its contract the cost would have been, at 16¼ cents per cubic yard, $215,841.76, a difference of $141,127.31, and $107,129.16 more than the retained percentages sued for.

XII

What became of the books and stock of the plaintiff company has not been satisfactorily shown by the evidence. The charter of the company was forfeited for nonpayment of taxes, after which, at the [fol. 41] request of the said Frank A. Barnaby, one Charles R. Wilson and William B. Firmin agreed to act as president and secretary of said company, respectively, and their only official act was to execute the power of attorney appointing Charles F. Wood, attorney in fact, to prosecute this suit. Neither Wilson, Firmin, nor Wood owned any stock in said company, nor had any interest in the two contracts between said company and the United States, nor in the retained percentages, nor did the said Frank A. Barnaby own any stock of record in said company at that time. What interest he or anyone else now has in said company is not shown by the evidence.

Conclusion of Law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and the petition is dismissed. Judgment is rendered against the plaintiff

in favor of the United States for the cost of printing the record in this case, the amount thereof to be entered by the clerk and collected by him according to law.

OPINION

BOOTH, Judge, delivered the opinion of the court.

Under the terms of a written contract the plaintiff company assumed obligations to dredge and dispose of 4,177,110 cubic yards of material, scow measurement, in Newark Bay and Passaic River for the sum of 16¼ cents per cubic yard. The dredging work provided for in the contract was intended to secure for the defendant a channel 16 feet deep at mean low water, extending 10.8 miles from Staten Island Sound to the Montclair and Greenwood Lake Railroad bridge. It was to be 300 feet wide for a distance of 9.7 miles and 200 feet from there on, a distance of 1.1 miles, and the contract so provided. Work was to commence within a month after the contractor received notice of the approval of the contract, and was to be prosecuted faithfully and diligently. The specifications, which are made a part of the contract, contained a provision for the retention by the defendant of 10 per cent of all payments made thereunder, until half of the work was completed, a fact to be determined by the engineer, and thereafter the plaintiff was to receive payment in full. The work under the contract progressed without any undue friction, and in a manner satisfactory to both parties, until January 1, 1910. As a matter of fact there was no complaint lodged against the contractor, and none could have been. Subsequent to this time trouble began to develop. The plaintiff fell far below its theretofore efficiency, until at last on September 24, 1912, it ceased work entirely, ascribing its difficulties to a distinct change in the character of the material encountered, a difference so violent as to amount, according to the allegations of the petition, to misrepresentation upon the part of the defendant in its specifications. On November 1, 1912, the plaintiff wrote the Secretary of War asking to be relieved from its contract, and predicating its request upon the substantial difference between the character of the material to be dredged, as shown in the specifications, and that actually encountered in the performance of the work, stating the difference to be such as to make the cost of removing the same inequitable and unjust to the contractor. The Chief of Engineers declined to accede to plaintiff's request, notified the company [fol. 42] to proceed with the work, and upon its failure to do so, annulled the contract on March 14 ,1913. The contract provided for such a proceeding, and paragraph 4 thereof authorized the defendant to relet the work and recoup the difference in price, if any, from the first contractor. This course was followed by the defendant. The plaintiff company had been paid for all work done up to September 24, 1912, except an alleged mistake in computation included in this suit, and $33,998.15 retained percentages withheld by the defendant under the provisions of the contract. This suit is for the recovery of both items, the $33,998.15 retained and $14,543.26, an alleged underpayment. We have not said anything about the supplemental agree-

ment between the parties executed August 3, 1911, because it in no way varies the issue, except argumentatively.

If the facts in this case correspond with the facts in the cases of Christie v. United States, 237 U. S. 234, and Hollerbach v. United States, 233 U. S. 165, the plaintiff is entitled to judgment. Of course, such a result might follow, even though there be no such similarity. Inasmuch, therefore, as the contention made indispensably involves a discussion of the facts, the court has endeavored to find them from a record not especially contradictory nor involved.

The contract sued upon was the result of a public advertisement for bids to do the contemplated work. As usual, the defendant made public and available to bidders such information respecting the work as it possessed, which bidders might call for. The plaintiff company was manifestly anxious and deeply concerned in its efforts to procure the contract, for its bid for the same was so decidedly beneath all others that it is inconceivable that experienced engineers would have dreamed of the undertaking at such a figure, unless some other and outside consideration inspired it. The plaintiff company, prior to submitting its bid, had before it subdivision (c) of paragraph 19 of the specifications, as follows:

"Character of Material. The material to be excavated is believed to be mud, sand, and gravel, but bidders are expected to examine the work and decide for themselves as to its character and make their bids accordingly, as the United States will not guarantee the accuracy of this description. The price per cubic yard will cover the removal of all material encountered except ledge rock."

It also had before it borings or soundings shown on three separate sheets, 143 in number, made in November and December, 1906, disclosing conditions found over a distance of 10.8 miles, and conveniently divided into three separate areas, the first sheet disclosing borings in 42 separate places over a distance of 2.2 miles, the second indicating the result at 32 separate places over a distance of 3.1 miles, and the third showing the balance of the 143 over a distance of 5.5 miles. In addition to the above three blue prints, a report made by the Chief of Engineers of the Army to Congress and published as a public document was furnished to the contractor by the defendant, in which it was said, among other things: "On the whole, the dredging would be comparatively easy and the cost moderate." Irrespective of this information, the plaintiff company in its proposal, without solicitation or requirement, voluntarily stated that it possessed "full knowledge of the kind, quantity, and quality of the work required," and agreed to do the work for 16¼ cents per cubic yard, [fol. 43] when the estimate of cost prepared by the engineers ran from 26 cents, for the lower, to 32 cents for the upper reaches of the area, and no other bidder had submitted a figure less than 22 cents.

Fraud and misrepresentation is frequently difficult to prove, but in this class of cases, wherein it most generally is to be deduced from printed documents, maps, and the blue prints, and the influential

effect of the same upon bidders, the conclusion as to its existence or non-existence is not quite so involved as the reconciliation and analysis of oral testimony, keeping in mind, of course, that we are speaking of constructive rather than actual and intended deceit. However, the rule is not to be relaxed. The court must not only find the representations to have been false, but, being so, did actually mislead the bidder who obtained the contract. Christie v. United States, supra.

The burden of proving misrepresentation rests upon the party making the allegation. It is not to be presumed, and one may not, either under the Christie or Hollerbach case, simply show a different condition in some respects from that which the chart or blue prints of borings discloses, and rest his case upon the theory that the court must infer a misrepresentation. There must be some degree of culpability attached to the makers of the maps and charts, either that they were knowingly untrue or were prepared as the result of such a serious and egregious error that the court may imply bad faith. The many contract cases in this court, too many to cite, sustain this principle.

The plaintiff had in its employ as manager and superintendent of its dredging plant Mr. John A. Seeley, an exceedingly competent man. Mr. Seeley made the estimate upon which the company made its bid and had entire charge of the dredging operations. Mr. Seeley had been for eleven years engaged in dredging over this identical area; he was thoroughly familiar with all local conditions, and while he had not dredged a channel deeper than 12 feet over this same course, he had completed one to that depth, and in so doing it is incredible that he was unfamiliar with the common character of the material to be dredged. Doubtless it was he who wrote into the plaintiff's proposal that the company was familiar "with the kind, quantity, and quality of the work required." Was Seeley, and thereby the plaintiff, deceived by the blue prints? It might well be argued that one of his long experience would not commit the monumental blunder of doing the work called for at such a reduced price unless he was misled as to the character of the material to be removed and the difficulties to be apprehended in performing the contract. The force of such a contention is effectually dispelled when Seeley's relation to the contract and those interested in the venture, as shown by the record, discloses itself. The origin and organization of the plaintiff company and its affiliation with the Newark Meadows Improvement Company is fully set forth in Finding VI. The ownership of the two companies was identical, and it was the indisputable purpose and intention, as a part of a large and important enterprise, to secure this contract—hence the obviously low bid—in order to secure a sufficient quantity of material to fill in and fill up a large area—about 3,500 acres—of swamp lands adjoining the lower reaches of the area to be dredged, acquired by the Newark Meadows Improvement Company, and at the time [fol. 44] practically worthless unless filled in. It is true the Newark Meadows Improvement Company agreed to pay ten cents per cubic yard for the material furnished, but this was in the end more

apparent than real. As a matter of fact, proven and not seriously disputed, the enterprise as a whole resulted in immense profits, as shown in Finding X, notwithstanding the dredging contract was performed to the date of abandonment at a serious loss. There was nothing wrong in this transaction, and there is no purpose to ascribe any irregularity to it. The parties had a perfect right to undertake it; nevertheless, it is a most potent factor in the determination of the issue as to being misled by the representations of the Government. It seems hardly possible to conclude that Seeley was misled as to local conditions, about which he knew as much as the Government officers. As to the borings themselves, the way employed to make them appears in Finding IV. It was not unusual. The character of material dredged within the limits of the borings shown on blue print #1 is not complained of, except when included in the general average to make up the full percentage of alleged errors. The borings in this stretch of 2.2 miles show "mud, mud and sand, mud and shells, sand and gravel," and yet the ten-day reports exhibit a strata of clay along the entire area. Clay is shown along with the above materials, in some instances hard enough to put the pumps of the plaintiff out of commission, and no complaint of any kind or character was lodged with the defendant respecting work in this area. On the other hand, it was done in a most expeditious manner, the quantities dredged being far in excess of the amounts required under the contract, and the same situation obtained as to operations under the second blue print except that the borings covering this section of 3.1 miles did show the presence of clay. It was not until the plaintiff company had completed fully, or very nearly so, two-thirds of the work that complaint was made, over five years after it had begun work, and at a time when it became more expensive to operate because so far away from a dumping base. It matters not, in so far as the performance of the contract work is concerned, what was the character of the soil in the first two areas dredged. Surely there was no misrepresentation as to these two areas, for the plaintiff company found the work easy and progress rapid. It claims, and justly so, great credit for efficiency in this respect. It was not until after a very considerable portion of the work embraced in the third area shown on blue print three was done that the plaintiff disavowed the accuracy of the blue prints and entered its protest, an area more than five miles from the area already dredged, a considerable distance away from the Newark Meadows Improvement Company's land, and an area manifestly more expensive to dredge because farther away from the place of deposit.

There is no proof here that the borings did not show exactly what the officers taking them found. While they may not have shown clay as present at each point where the borings were made, they do disclose the presence of clay where clay was found, and in addition show clay present at a sufficient number of places to put the contractor on notice of its presence in the bottom of the channel, and thereby warn him of difficulties to be anticipated. It is not disputed, and may not be, that whenever the steel rod ran upon a bowlder the fact was recorded and the boring apparatus moved to another place

[fol. 45] for another boring. The record confirms the statement that the material dredged conformed generally to the material indicated by the borings, and no more could be done and no more is required. The facts are totally unlike the record in the Christie case. In the latter case borings were made, and if a log was encountered the officer moved the boring apparatus to a point free from logs, and then recorded it as having been made at exactly the point where the log was found, thus leading the contractor to believe that no logs had appeared at this point, when, as a matter of fact, the log was there, had been found but not recorded at all. There can be no misrepresentation in borings recorded as in this case where the record shows beyond doubt that what the borings indicate was correctly and honestly stated on the boring sheets. It would be difficult, even under circumstances a little more favorable to the plaintiff, to hold that an actual misrepresentation as to the borings was in all respects the moving and primary cause of plaintiff's refusal to proceed with the contract. The plaintiff undertook the work at too low a figure, profits were being absorbed, and it was losing money. The contract was growing in burdensomeness, and the plaintiff found it impracticable, although it might have done so, to longer pump its dredged material on the Newark Meadows Improvement Company's lands. The plaintiff's plant was allowed to deteriorate and an accumulating variety of discouraging factors faced the plaintiff if it continued to operate as it had done before. The motive to seize upon most any cause for discontinuance was present.

The plaintiff is suing only for the retained percentages and underpayment, and while it seeks to justify its procedure and positively disclaims any intent to an actual, voluntary abandonment of its contract, and charges the defendant with a breach thereof, no claim is made for damages other than as stated above. This claim we believe to be untenable. The findings show the true state of facts as we view them from the record, with respect to the underpayment claim, and we do not think it necessary to further discuss this item of the claim. It does appear from the evidence that the plaintiff was paid for all the material he was entitled to be paid for under the contract.

It is somewhat doubtful, in view of the facts, whether this suit may be maintained at all under the present status of the corporation. The testimony reveals the fact that before the plaintiff refused to proceed with the contract all stock in the corporation, including the dredging plant, was sold to Frank A. Barnaby for $1,000, including this claim. The charter of the company was forfeited for nonpayment of taxes and the facts incident thereto appear in Finding XII. It may be that the reorganization of the corporation and the election of officers was not in all respects legal. At any rate, there is not sufficient evidence in the record to hold otherwise. The defendant was content to rest the issue on this meager showing of fact, and we are not convinced that we would be warranted in dismissing the case on this issue alone. The allegations of the petition, not contradicted except as above, disclose the status of the plaintiff, and we have given the facts appearing of record as requested.

The petition will be dismissed. It is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge; and Campbell, Chief Justice, concur.

[fol. 46] VI. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the Second day of April, A. D., 1923, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of Two hundred and seventy-nine dollars and twelve cents ($279.12), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

VII. HISTORY OF PROCEEDINGS AFTER ENTRY OF JUDGMENT

On June 1, 1923, the plaintiff filed a motion for a new trial.

On January 28, 1924, plaintiff's motion for a new trial was argued and submitted by Mr. C. C. Calhoun, for the plaintiff, and submitted, without argument, by Mr. Arthur Cobb, for the defendant.

On February 18, 1924, the court filed an order overruling plaintiff's motion for a new trial.

[fol. 47] VIII. PLAINTIFF'S APPLICATION FOR APPEAL—Filed May 15, 1924

From the judgment in the above-entitled cause, on the 18th day of February, 1924, in favor of the defendant, the plaintiff, by its attorney of record, on the 15th day of May, A. D., 1924, makes application for and gives notice of an appeal to the Supreme Court of the United States.

C. C. Calhoun, Attorney of Record for Midland Land and Improvement Company.

IX. Order of Court Allowing Plaintiff's Application for Appeal—Filed May 26, 1924

On this 26th day of May, 1924, it is ordered by the court that the plaintiff's application for appeal be and the same is allowed.

By the Court.

[fol. 48] In Court of Claims

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Booth, J.; of the judgment of the court; of the history of proceedings after entry of judgment; of the plaintiff's application for an appeal and of the order of the court allowing said application:

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 31st day of May, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 30,435. Court of Claims. Term No. 470. Midland Land and Improvement Company, appellant, vs. The United States. Filed June 23rd, 1924. File No. 30,435.